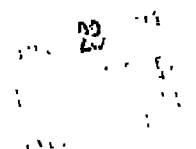




UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

231563



GENERAL COUNSEL

December 22, 2011

VIA UPS

Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20024

ENTERED
Office of Proceedings

DEC 23 2011

Part of
Public Record

RE: FD 35582

Rail-Term Corp. Petition for a
Declaratory Order

To Whom It May Concern:

This letter is in connection with the Petition for a Declaratory Order filed by Rail-Term Corp. on December 14, 2011. In the decision at issue in this case, B.C.D. 11-14, rendered on January 28, 2011, the Railroad Retirement Board (hereinafter referred to as "the Board"), determined that Rail-Term Corp. ("Rail-Term") is an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts (the Acts). The Board found that Rail-Term is a covered employer because its dispatching services are an inextricable part of a rail carrier fulfilling its common carrier obligation. The Board found that it must construe the Railroad Retirement Act and Railroad Unemployment Insurance Acts broadly to satisfy the Congressional intent of the Acts which has been found to be that employees performing integral services within the railroad industry are to be covered under the Acts.

On March 28, 2011, Rail-Term filed a Petition for Review of that decision with the United States Court of Appeals for the District of Columbia Circuit. In an Order dated November 14, 2011, the Court of Appeals for the District of Columbia Circuit ordered that the Petition for Review filed by Rail-Term Corporation on March 28, 2011, be held in abeyance pending further order of the Court to allow



Rail-Term to petition the Surface Transportation Board (STB) for a declaratory order on the question whether Rail-Term is a "rail carrier" under 49 U.S.C.

§10102(5). Rail-Term was directed to submit a report to the Court within thirty days of the November 14, 2011, Order, advising the Court of the status of its filings with the STB. Once the STB has issued a decision, the parties (*i.e.*, Rail-Term and the Board) are directed to file motions with the Court within thirty days of the STB decision, to govern further proceedings in the case. On December 14, 2011, Rail-Term filed a Petition for a Declaratory Order with the STB requesting the issuance of a declaratory ruling finding Rail-Term not a "rail carrier" under the I.C.C. Termination Act ("ICCTA").

As the STB knows, the Board has previously addressed the question of whether an entity that provides dispatching for interstate railroad operation should be considered a covered employer under the Acts administered by the Board in *Trinity Railway Express - Train Dispatching Herzog Transit Services, Incorporated* (B.C.D. 09-53), which was affirmed by the Court of Appeals for the Seventh Circuit in *Herzog Transit Services, Incorporated, et al. v. United States Railroad Retirement Board*, 624 F.3d 467 (7th Cir. 2010) *Rehearing, en banc, denied*, 2011 U.S. App. LEXIS 618 (7th Cir. Jan. 3, 2011) (*Herzog*).

Uniformity among the Circuits is desirable to ensure consistent determinations under the Acts, and the Board has an interest in preserving the viability of the railroad retirement and unemployment benefit systems created by the statutes which it administers. To assist the STB in its determination, the Board has attached a full copy of B.C.D. 11-14. A copy of the record which was used before the Court of Appeals for the District of Columbia Circuit, or any other information or comment, can be provided, should the STB require it. The Board stands ready to participate in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven A. Bartholow", written in a cursive style.

Steven A. Bartholow
General Counsel

Attachment

EMPLOYER STATUS DETERMINATION – DECISION ON RECONSIDERATION
Rail-Term Corporation

This is the decision on reconsideration of the Railroad Retirement Board (hereinafter the Board) of its determination dated April 6, 2010 (B.C.D. 10-33) pursuant to 20 CFR 259.3(a) concerning the status of Rail-Term Corporation (Rail-Term) as an employer under the Railroad Retirement Act (45 U.S.C. s 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. s 351 et seq.) (RUIA) (the RRA and RUIA are hereinafter collectively referred to as "the Acts").

In its decision dated April 6, 2010, a majority of the Board determined that Rail-Term is a covered employer with respect to its train dispatching employees since that operation consisted of common carriage by rail in interstate commerce due to the integral nature of train dispatching to the overall operation of movement of goods by rail. The Board affirms and adopts its initial decision dated April 6, 2010 with the following additional comments set out below.

On July 9, 2010, Rail-Term filed with the Secretary of the Board a Petition for Reconsideration of Board Coverage Determination ("B.C.D.") 10-33 pursuant to 20 C.F.R. 259.3(a). In its petition, Rail-Term requested the Board to reconsider and reverse its determination in B.C.D. 10-33 and find that Rail-Term is not a covered employer under the Acts because the dispatchers employed by Rail-Term are similar to other independent contractors not found to be covered employees in other cases. Additionally, Rail-Term requested a stay of any applicable requirements to report service and compensation pending the Board's decision in the Petition for Reconsideration of B.C.D. 10-33.

I. PRIOR BOARD PROCEEDINGS

In rendering this decision, the Board adopts and hereby incorporates the prior Board proceedings as stated in the Board's initial decision rendered April 6, 2010. In addition to those proceedings, the following actions have occurred and are part of the record concerning the present case. After Rail-Term filed its Petition for Reconsideration, Rail-Term filed a Petition for Declaratory Relief with the Surface Transportation Board (STB) on June 3, 2010. The Petition sought a Declaratory Order by the STB that Rail-Term was not a "rail carrier" within the meaning of the I.C.C. Termination Act, 49 USC 10102(5). Subsequently, the STB declined to rule (order issued October 8, 2010) on this issue since it was pending before the Board and determined that the Board's ruling would control Rail-Term's status under the Acts. Additionally, on October 22, 2010, the United States Court of Appeals for the Seventh Circuit issued a decision in Herzog Transit Services, et al. v. U.S. Railroad Retirement Board, which was a case that also determined the status of train dispatchers. Both the Board and Rail-Term cited to the "Herzog" case in prior decisions and arguments. In denying Herzog's Petition for Review and upholding the Board's final Agency Decision, the United States Court of Appeals for the Seventh

Circuit ruled that Herzog was, insofar as it performed the dispatching function for interstate trains, a covered employer under the Acts.

II. ARGUMENT

Initially, it should be noted that Rail-Term, in its petition for reconsideration, does not raise any new issues which were not previously adjudicated by the Board in its April 6, 2010 initial decision. Rail-Term has expanded upon its previous argument that Rail-Term is not a "rail carrier" under the Acts and that its dispatchers are not under the control of the rail carrier clients whom it serves. In the Petition for Reconsideration, Rail-Term presents its basic argument in four parts. 1) Rail-Term is not a Rail Carrier under the ICC Termination Act. 2) The Board's ruling is materially wrong because it violates the plain language of the statute. 3) The Board's reliance on selective Federal Railroad Administration regulations as a basis for jurisdiction is misplaced. 4) The Board erred by basing its decision on precedent that is either inapposite or wrongly decided while ignoring other precedent favorable to Rail-Term.

Additionally, Rail-Term then requested that the Board stay proceedings until the decision on reconsideration is reached. The Petition also included arguments that relied upon two matters that had not yet been decided: 1) an assumption that the STB would determine that Rail-Term is not a "rail carrier" and 2) an assumption that the Seventh Circuit would overturn the Board's decision that Herzog Transit's dispatchers are covered employees under the Acts. The previously discussed decisions in both of these cases render these arguments on reconsideration moot. The Board will respond to the remaining arguments of Rail-Term in its Petition for Reconsideration.

The majority of the Board rendered its April 6, 2010 decision with respect to the status of Rail-Term as an employer under the Acts by finding that the traditional work of dispatching has been performed by employees of individual railroads; however, although modern business decisions have created situations where dispatching is performed by a separate entity, the work is essentially the same. The dispatcher controls the movement of the trains and no railroad can fulfill its common carrier obligation unless its trains move; therefore, dispatching is an integral part of the operation of a common carrier. The Board found on this basis that Rail-Term is itself a rail carrier within the definition of an employer under the Acts.

Dispatchers control the movement of freight or passengers over rail lines. The Board recognizes that Rail-Term does not, itself, operate the trains, but it does direct engineers in the movement of trains. Without an order from a dispatcher, a train does not move and cannot deliver its freight or passengers. Dispatching is a crucial component of the movement of freight or passengers from point A to point B. In other words, a railroad cannot fulfill its obligation to provide rail service without dispatching services. Similar to the situation where a carrier contracts with another entity to operate its trains, which results in the Board finding the contractor to be an employer, a contractor that provides the essential operating service of dispatching for an employer may be found to be an employer under the RRA and RUIA. In B.C.D. 02-12, the Board held that a commuter authority that provided dispatching services for the Union Pacific, Amtrak, and Burlington Northern Santa Fe was a covered employer with respect to the "carrier

services", i.e. dispatching, that it provided to the Union Pacific, Amtrak, and BNSF. In B.C.D. 03-38, the Board found that a company that provided temporary operating personnel, including engineers, conductors, trainmen, and dispatchers, to a rail carrier employer was itself a rail carrier employer. In reaching its decision in B.C.D. 03-38, the Board cited an earlier decision in B.C.D. 03-23 that had concluded that an entity that contracts to provide rail operations on behalf of another is an employer.

Turning to Rail-Term's specific arguments on reconsideration, Rail-Term states that it is not a rail carrier within the meaning of the ICC Termination Act (ICCTA) in its first argument. It finds support for this argument in two STB decisions that Rail Term argues describe what the STB considers to be a "rail carrier" under an act which the STB administers.

However, this argument misses the point. In determining what constitutes a rail carrier under the RRA and RUIA, the threshold inquiry begins with what constitutes a rail carrier subject to STB jurisdiction, but it does not end there. This is because the regulatory schemes of the RRA and ICCTA are not symmetrical. Standard Office Buildings Corporation v. United States, 819 F.2d 1371, 1378 (7th Cir. (1987)). By virtue of the control that it exercises over the movement of trains, Rail-Term is a rail carrier within the meaning of that term under the RRA and RUIA. To hold otherwise would allow for easy erosion of the RRA and RUIA by parsing out interstate transportation by rail to non-covered entities.

Further, the Board finds that consideration of the all the subsections of the Railroad Retirement Act's definition of "employer" at 45 USC Section 231 (a) (1) makes clear that "congress envisioned a broad retirement program for employees playing many roles within the railroad industry." (see Herzog v. pg. 18 citing USRRB v. Fritz 449 U.S. 166 (1980) which noted that the Act was intended to benefit people who pursued careers in the rail industry.)

As the Seventh Circuit further stated in Herzog:

Our colleagues in the District of Columbia Circuit have put it, The statute has a "broad purpose" and a "protective character." Cheney R.R. Co., 50 F.3d at 1078. As the judges of the District of Columbia Circuit also have said, the legislative history supports a reading of the text that gives effect to Congress's clear intent that this benefit statute "be construed broadly." *Id.* at 1077-78. Secondly, as we recognized in Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295, 298-99 (7th Cir. 1992), the provisions of this statutory scheme are not to be constrained by the business models common at the time of the passage of the Act. Unless and until Congress deems otherwise, they are equally applicable to today's railroad industry and the organizational relationships of today's business environment, which reflect, among other factors, increased competition and the increased frequency of intrastate commuter lines sharing trackage and other facilities with participants in the Nation's interstate railway system. It is not unusual for an entity, the activities of which generally do not involve interstate transportation, to perform a particular function that is an integral part of interstate transportation by rail and that

therefore is subject to the Acts. The RRA may have been enacted when all functions integral to interstate transportation usually was performed by carriers or their affiliates. Today, the rail transportation industry has adopted other efficiencies. Our duty nevertheless remains the same. We must apply the statute To ensure individuals performing these integral functions to interstate Rail transportation is covered and thereby effectuate Congress's broad protective purpose. (Herzog pgs. 19 and 20).

The Court's reasoning bolsters the Board's logic in finding Rail-Term to be a covered employer. Simply put, modern developments to the railroad industry's business model were not contemplated at the time of enactment of the Acts. The Court explained that it is the duty of the Board to continue to apply the acts to ensure the inclusion of individuals performing integral rail transportation functions to be covered under the Acts. It is therefore appropriate for the Board to find Rail-Term to be covered under the Acts because its employees perform the integral rail function of dispatching services.

Next, Rail-Term argues that the Board's reliance on selective Federal Railroad Administration (FRA) regulations as a basis for jurisdiction is misplaced. Rail-Term's argument alleges that the Board is ignoring some FRA regulations while placing undue weight on others. Specifically, Rail-Term cites that the FRA regulates track safety standards, railroad equipment standards, and locomotive safety standards and that these entities that independently contract for these services have been found to be not covered under the Acts administered by the Board. The Board notes that this argument put forth by Rail-Term misses the fundamental logic behind the Board's finding. The decisions cited by Rail-Term in its footnote 8 on page 15 of its Petition all deal with maintenance, repairs, training and certification, or development of crossing signals. Although these services are integral to transportation by rail, they do not constitute transportation by rail. Through its dispatching function Rail-Term is moving trains in interstate commerce which makes it a rail carrier subject to the RRA and RUIA.

Finally, Rail-Term argues that the Board erred in its previous coverage determination by basing its decision on precedent that is either inapposite or wrongly decided while ignoring other precedent favorable to Rail-Term. Rail-Term argues that the Board should not have relied upon the Herzog case nor the SCRRA case in support of its decision. Further, Rail-Term argues that if the Board would strictly apply the test for independent contractor status as articulated in the case of Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway company, 206 F. 2d 831 (8th cir. 1953), the Board would conclude that the dispatchers employed by Rail-Term are not integrated into the contracting railroad's operations and therefore not subject to the control of the individual railroads for whom Rail-Term performs dispatching services.

This argument by Rail-Term appears to miss the point of the Board's holding in its April 6, 2010 decision. Rail-Term argues in its Petition for Reconsideration that Rail-Term's dispatchers are not integrated into the operations of the client railroads and that its dispatchers are not subject to the control of the client railroads. Rail-Term argues that they are an independent contractor with numerous rail carrier clients. Rail-Term points out that its dispatchers report to a Rail-Term Supervisor and not to the client rail carriers. Further, Rail-Term cited to a long list of administrative functions that Rail-Term itself

provides to the employee dispatchers that further separates the dispatchers from the individual rail carrier clients.

However, these assertions again miss the thrust of the Board's initial decision. Employees of Rail-Term are covered under the RRA and RUIA not by virtue of their relationship to the contracting railroads, but by virtue of their employment relation with Rail-Term, a rail carrier under the RRA and RUIA.

Even if Rail-Term were not considered a carrier under the RRA and RUIA, Kelm would not prevent its employees from being considered employees of the contracting carriers which are also covered under the RRA and RUIA. This alternate theory was suggested by the Management Member in his dissent in the initial decision and was carefully examined in that decision.

The Board finds that the dispatchers perform a service that is an inextricable part of the rail carrier's mission. The Board previously found that without the services of a dispatcher, a rail carrier's trains cannot run. The job of a dispatcher is as critical to the operation of a railroad as is that of a locomotive engineer. Because dispatching is an inextricable part of the rail carrier's fulfilling its common carrier obligation, the Board continues to find for the reasons explained in our initial decision that dispatchers who work for Rail-Term could, in the alternative to Rail-Term being found to be a covered employer under the Acts, be found to be employees of each railroad for which Rail-Term provides dispatching services. The arguments set forth by Rail-Term distinguishing and separating its dispatchers from the day to day administration of the rail carrier clients are noted, but the Board finds that this administrative separation argument does not address the central finding that the Board has determined that dispatching, in and of itself, is an inextricable part of the mission of a rail carrier.

In addition to the four main arguments in its Petition for Reconsideration, Rail-Term argues that in the past, several "senior and now retired or dead Board officials" advised Rail-term that it would not be regarded as a "covered employer." Rail-Term argues that it relied on this advice to its detriment, given the April 6, 2010 coverage decision issued by the Board. The Board reminds Rail-Term that the agency cannot be estopped from following the explicit language of the Act by misinformation provided by one of its employees. See Office of Personnel Management v. Richmond, 496 U.S. 414 (1990). Even if Rail-Term had received a verbal opinion by a Board employee in the past that the individual Board employee felt that Rail-Term would not be considered a covered employee, Rail-Term cannot prevent the Board from reaching the opposite conclusion.

Rail-Term also sought a stay of the proceedings while the Board's decision on reconsideration was pending. The Board previously granted the stay with regard to coverage under the RUIA. The Board concludes that RUIA coverage will begin with the date of this decision on reconsideration.

Finally, the Board notes that it issued a decision finding Rail-Term to be a covered employer on April 6, 2010. Because upon inquiry Rail-Term commenced dispatching services in the United States in good faith believing that the Board would not find them covered under the RRA and RUIA, the Board modifies its initial decision and finds service

creditable commencing May 1, 2006, the beginning of the four year period preceding the first day of the month after the month in which the initial decision was released, see 20 CFR 211.16.

III. CONCLUSION

In summary, Rail-Term employs dispatchers to perform contracted dispatching services to a number of rail carrier clients. The Seventh Circuit and the Board have held that train dispatching services are an inextricable part of a rail carrier fulfilling its common carrier obligation. Further, the courts agree that the Board must construe the Acts broadly to satisfy the Congressional intent of the Acts which has been found to be that employees performing integral services within the railroad industry are to be covered under the Acts. Based on the above stated reasons, the Board affirms on reconsideration its initial decision of April 6, 2010, and concludes that Rail-Term is a covered employer with respect to its train dispatching services.

On reconsideration, the Board's initial decision is affirmed.

Original signed by:

Michael S. Schwartz

V.M. Speakman, Jr.

Jerome F. Kever

**JEROME F. KEVER
MANAGEMENT MEMBER
DISSENT**

RAIL TERM CORPORATION

The majority's decision does not contain any additional arguments that persuade me to alter my position articulated in my dissent in the initial determination, by a majority of the Board, finding Rail Term to be a covered employer under our Acts. Further, the majority's finding that Rail Term is an employer makes moot any further analysis or need to comment on attributing Rail Term employees as employees of their rail carrier clients.

First, I must comment on a procedural aspect of this matter. Rail Term filed a petition on June 3, 2010 seeking a Declaratory Order from the Surface Transportation Board (STB) declaring Rail Term not to be a rail carrier within the meaning of 49 U.S.C. 10102(5). On July 9, 2010, Rail Term filed a request for reconsideration before this Board and noted that a petition had been filed before the STB. On October 8, 2010, the STB denied the request citing the fact that the Railroad Retirement Board did not refer this matter, or stay their decision, pending a determination by the STB as it did in H & M International Transportation, Inc. and American Orient Express Railway Co. (Rail-Term Corp. – Petition for Declaratory Order, Docket No. FD 35381 (October 8, 2010)).

While this Board did not formally stay – nor did petitioner specifically request a stay, the Board did not immediately act upon the reconsideration request until it learned that the STB denied Petitioner's request. Reflecting on this, I believe we would have been better served had the Board formally stayed its proceedings in accordance with review of the STB. Certainly, it's in the best interest of the public to ensure that there is a level of consistency in interpretations of similar statutory provisions amongst federal agencies. It may be useful in future cases to foster better communication between our two agencies. This would certainly avoid the potential of competing interpretations should the STB review this matter at a future date.

The substantive arguments contained in the majority's decision, mirror those contained in the initial determination but with updated results of the 7th Circuit Herzog decision and, as mentioned above, the decision of the STB. However, as I discussed in my prior dissent, the Herzog decision does not directly bear upon this matter since Herzog, in essence, became a carrier under our Acts as an application of our prior Railroad Ventures determination. This stemmed from DART having owned the tracks upon which interstate freight travels and assuming dispatching functions through its contractor Herzog. Yet, a recent determination by the STB in the Florida Department of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Docket No. 35110 (December 15, 2010) found that merely dispatching interstate freight traffic does not necessarily subject one to being a carrier under the STB's jurisdiction. It cites a line of cases stemming from its determination in the "State of Maine" case in 1991. This will undoubtedly present some confusion in interpreting the Herzog case and applying it to other similar situations.

While the majority cites a passage from the Herzog decision quoting the words “broad purpose” and a “protective character” of the Railroad Retirement Acts, Herzog at p. 18, the Court in Herzog also reaffirmed, that “Congress intended ‘carrier’ to have the same meaning in both these closely related statutes and that the RRA statute therefore affords no broader coverage than the OCCTA.” (See, Herzog at p. 13). Therefore, it belies common sense and precedent to find Rail Term to be a carrier where it does not own or lease tracks, own or lease rail cars or locomotives, and does not hold itself out to the public as providing interstate transportation services. For these reasons, I again must dissent.

Original signed by:

Jerome F. Kever, Management Member
1/21/11

CERTIFICATE OF SERVICE

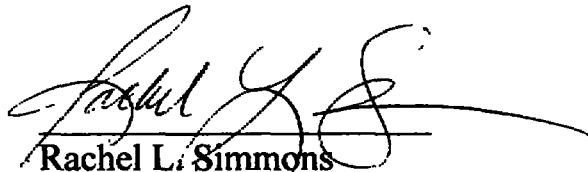
I hereby certify that I have today served a copy of the letter of the Railroad Retirement Board to the Surface Transportation Board in the matter of FD 35582 upon all parties of record in this proceeding by mailing one copy of the letter via UPS Next Day Air to Rail-Term Corp.'s attorneys:

John D. Heffner
John D. Heffner, PLLC
1750 K. Street, Suite 200
Washington, D.C. 20006

Dennis M. Devaney
Devaney Jacob Wilson, PLLC
3001 West Big Beaver Road, Suite 624
Troy, MI 48084

I further certify that on this date I have served the required number of copies of the letter with the Surface Transportation Board via UPS Next Day Air.

Date: December 22, 2011



Rachel L. Simmons
General Attorney
Railroad Retirement Board
844 Rush Street
Chicago, Illinois 60611
(312) 751-4946
Rachel.simmons@rrb.gov